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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-170

GEORGE L. MOORE,
Petitioner,

vs.

THE BOARD OF TRUSTEES OF CARSON-TAHOE HOSPITAL, a Public Hospital, and WILLIAM E. SCHULTZ, WILLIAM A. YOUNG, L. GENE GOLD, JOSEPH N. LITTLEFIELD, MARY O. KNAPP, and WILLIAM R. KING, constituting the members of said Board,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada

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BRIEF FOR RESPONDENTS IN OPPOSITION

The Respondents, William E. Schultz, William A. Young, L. Gene Gold, Joseph N. Littlefield, Mary O. Knapp, and William R. King, pray that the Petition

filed with this Court by George L. Moore for a Writ of Certiorari to review the opinion and judgment of the Supreme Court of the State of Nevada rendered in these proceedings on April 6, 1972, and made effective May 3, 1972, be denied.

OPINIONS BELOW

The opinion of the United States District Court, District of Nevada, is unreported, and appears at Appendix C, *infra,* pp. xii-xiv.

QUESTIONS PRESENTED

As stated in the Petition for Writ of Certiorari, the By-Law provision, "unprofessional conduct," was not defined in the By-Laws in terms of specific written rules of conduct. An existing and established objective standard of conduct in relation to each of the charges filed against Petitioner was defined for the hearing Board through expert testimony. Therefore, the Questions Presented would be more accurately stated as follows:

1. Is the Board of Trustees of a public hospital in exercising its admitted authority to terminate medical staff privileges of a physician limited solely to consideration of violations of specific written hospital rules and regulations?

2. Is there sufficient evidence in this case to support the findings of the Board?

STATEMENT OF FACTS

Respondents herein accept to the extent stated in the Petition for Writ of Certiorari the statement of facts of Petitioner as being substantially true and correct, but feel it is necessary to submit in addition to, and as an extension of facts cited in Petitioner's statement of facts, further facts which will serve to clarify certain and somewhat misleading statements in Petitioner's statement of facts.

On July 30, 1969, one day prior to the termination of Petitioner's staff privileges mentioned at page 6 of Petitioner's Petition, Petitioner, *with his counsel,* appeared before the Carson-Tahoe Hospital active medical staff to discuss the same allegations of "unprofessional conduct" that were ultimately to be the basis of the hearing before the Board of Trustees. A copy of the minutes of said meeting were part of the record on appeal to the Nevada Supreme Court. (Appendix A, *infra,* pp. i-x) Following said hearing, the active medical staff submitted a written recommendation to the Board of Trustees to the effect that "staff privileges of George L. Moore, M.D., be immediately terminated due to unprofessional conduct". (Appendix B, *infra,* p. xi) On July 31, 1969, the Board of Trustees, only after due consideration of the medical staff's recommendation and pursuant to Subsections A and H, Section 7, Article 4, of the By-Laws of the medical staff of Carson-Tahoe Hospital, terminated Petitioner's staff privileges. The First Judicial District Court of the State of Nevada, in and for Carson City, subse-

quently entered an Order allowing Dr. Moore to retain conditional staff privileges until a full administrative hearing by the Board of Trustees.

Petitioner was then again informed in writing of the specific allegations of "unprofessional conduct" made against him and of a date for a full hearing before the Board of Trustees on such charges.

In contrast to Petitioner's statement that 10 of the 12 charges were dropped due to "lack of proof," a close reading of the findings by the Board of Trustees will reveal that there was definitely evidence presented on most of the 10 charges, not just on two charges. (Petitioner's Appendix C, p. xx)

Petitioner's characterization of one of the charges as a "failure to use rubber gloves," is misleading. The charge was for failure to utilize any of the accepted and standard sterile techniques while administering spinal anesthetics, which included much more than the failure to use rubber gloves. (Petitioner's Appendix A, at p. iii) The Petitioner's characterization of charge 11 as abiding by the judgment of Dr. Hines and Dr. King is again misleading. The charge was that Petitioner intended to perform surgery despite his obviously impaired condition to do so and was prevented from proceeding only by action on the part of the Chief of Staff and another surgeon, not Petitioner's voluntary action. (Petitioner's Appendix A, at page iii)

Following the filing of the Nevada Supreme Court opinion and subsequent order denying rehearing, Peti-

tioner filed an action in the United States District Court, District of Nevada, under the provisions of the Civil Rights Act, 42 United States Code, §1983, alleging exactly the same issues considered by the Nevada Supreme Court and which are the basis of his application to this Court for a Writ of Certiorari. On June 20, 1972, an order dismissing the action was entered by the said United States District Court, District of Nevada, on the grounds of Res Judicata. (Appendix C, *infra,* pp. xii-xiv) Petitioner filed on July 11, 1972, an appeal with the Ninth Circuit Court on the decision of the United States District Court. (Appendix D, *infra,* p. xv) The record on appeal has been docketed (Appendix E, *infra,* p. xvi), and the appeal is now pending.

ARGUMENT

A. THERE IS NO FEDERAL QUESTION OF SUBSTANCE INVOLVED

1. In the instant case the medical staff By-Laws were followed in all stages of the proceedings, including a hearing before the full medical staff, and their subsequent recommendation to the Board of Trustees. The statutory powers of the Board of Trustees to act as they did is unchallenged by the Petitioner. Procedural due process was followed at all stages. (Petitioner's Appendix A, at page v) Evidence was presented on most of the charges and substantial evidence was presented on two charges which were the basis for the Board's action. (Petitioner's

Appendix A, at page ix and Appendix C, at page xxvi) Without question, the objective standard for administering a spinal anesthetic was established through the testimony of three experts—a nurse anesthetist and two physicians. (Petitioner's Appendix A, at p. ix) The same was true of the second charge. (Petitioner's Appendix A, at p. ix and Appendix C at p. xxviii)

Petitioner himself admits deviating from the accepted standard procedure. (Petitioner's Appendix A, at p. ix)

If the Board's action in terminating Petitioner's medical staff privileges was based upon proven and admitted deviations by Petitioner from a reasonably objective standard relating to medical competency and professional responsibility of which the Board was aware, the real issue is whether the Board's action is arbitrary and unreasonable. This is not a federal question of any substance. A reasonably objective standard was established and evidence of a deviation from that standard was presented. The only real question as it applies to Petitioner is essentially a review of the evidence which function was performed quite adequately by the state courts. (Petitioner's Appendices A and B)

Therefore, Petitioner's alleged federal question that the By-Law provisions providing for termination of staff privileges on the basis of "unprofessional conduct" *as it was applied to him* was a violation of due process is entirely without substantiation or merit.

2. Petitioner also contends that the standard of "unprofessional conduct" without further written amplification or definition in the By-Laws is too vague and indefinite and void per se. Prior United States Supreme Court opinions and lower court opinions have resolved this issue so it is no longer a substantial federal question. It was decided by this Court in the early case of *Selling v. Radford,* 243 U.S. 46, 37 S.Ct. 377, 61 L.Ed. 585 (1917) that the standard "unprofessional conduct" is a proper standard in determining fitness for practicing a profession. More recently in *Konigsberg v. State Bar,* 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed. 810 (1957) this Court made reference to the standard "good moral character" indicating it was difficult of definition and could be abused, but accepted it as a proper standard for a state to use in evaluating persons for admission to the State Bar.

In a second case involving Mr. Konigsberg, *Konigsberg v. State Bar,* 366 U.S. 36, 6 L.Ed.2d 105, 81 S.Ct. 997, at pages 40 and 41 (1961), this Court again reiterated its position that the standard "good moral character" is unquestionably acceptable in evaluating the fitness of a bar applicant.

In *Brinkley v. Hassig,* 130 Kan. 874, 289 P. 64 (1930), a case very similar to the instant case, the State Medical Board revoked the license of a physician to practice medicine following a hearing upon the filing of a complaint alleging eleven specific charges of fraud, immorality and unprofessional conduct. A Kansas statute allowed revocation for "un-

professional conduct". An appeal was taken to the United States Supreme Court and was dismissed because no substantial federal question was presented. *Brinkley v. Hassig,* 282 U.S. 800, 51 S.Ct. 39, 75 L.Ed. 720 (1930). Subsequently, in the same matter the Circuit Court of Appeals, Tenth Circuit, held that the statute providing for revocation of a license on grounds of "unprofessional conduct" was valid. *Brinkley v. Hassig,* 83 F.2d 351 (10th Cir. 1936).

In due process terms there is no logical distinction between disbarment and denial of admission. *In Re Ruffalo,* 390 U.S. 544 (1968).

Statutes or By-Laws which permit revocation of a medical license for "unprofessional conduct", "incompetency" or similar language have been held valid in the large majority of jurisdictions, both federal and state, notwithstanding their generality. *Sosa v. Bd. of Management of the Val Verde Memorial Hosp.,* 437 F.2d 173 (5th Cir. 1971); *Woodbury v. McKinnon,* 447 F.2d 839 (5th Cir. 1971); *North Broward Hospital Dist. v. Mizell,* 148 So.2d 1 (Fla. 1962); *Arizona State Bd. of Medical Examiners v. Clark,* 398 P.2d 908 (Ariz. 1965); *Darling v. Charleston Community Memorial Hospital,* 33 Ill.2d 326, 211 N.E.2d 253, 14 ALR3d 860 (1965); *Brinkley v. Hassig,* 83 F.2d 351 (10th Cir. 1936); *State Dental Examiners v. Savelle,* 90 Colo. 177, 8 P.2d 693 (1932). The Nevada Supreme Court decision *rejecting* Petitioner's argument that the standard of "unprofessional conduct" is too vague and indefinite and void on its face is in accord, not in conflict, with this

Court's decisions and the majority of lower court decisions.

B. THE DECISION OF THE NEVADA SUPREME COURT IS NOT IN CONFLICT WITH ANY DECISIONS OF THIS COURT.

1. Petitioner implies that the decision of the Supreme Court of the State of Nevada is in conflict with *Schware v. Bd. of Bar Examiners,* 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. 796 (1957) and *Konigsberg v. State Bar,* supra. It has been long established that the scope of review by the United States Supreme Court of a state administrative disbarment proceeding is narrowly restricted. *Selling v. Radford,* supra.

The long established principle of this Court that the scope of review in reviewing administrative hearings of this nature is quite narrow was reaffirmed in *Theard v. U.S.,* 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957), wherein it was stated:

> "It is not for this Court except within the narrow limits for review open to this Court, as recently canvassed in *Konigsberg v. State Bar,* 353 U.S. 252, and *Schware v. Bd. of Bar Examiners,* 353 U.S. 232, to sit in judgment on Louisiana disbarments . . ."

A review by this Court of the state disbarment proceedings in *Schware v. Bd. of Bar Examiners,* supra, and *Konigsberg v. State Bar,* supra, was granted only because of the existence of *special* and *exceptional* circumstances. In the *Schware* case the hearing board neither called any witnesses nor introduced any evidence of bad moral character against the applicant.

In both cases the reasons for disbarment were based upon guilt by association with the Communist party. There was no real evidence reasonably related to good moral character and even less evidence in any way related to the applicant's competence to practice law.

In the instant case all the charges relate either to Petitioner's general conduct while in the hospital or directly to his performance of a particular medical procedure. The evidence presented to sustain the charges was specifically related to his competency in medical techniques and procedures. The Board of Trustees did not have to assume any facts or accept any presumption of guilt through association such as the Board did in the *Schware* and *Konigsberg* cases. The Carson-Tahoe Hospital Board of Trustees did not have to make a decision as to whether the alleged conduct of Petitioner was related to medical competency as both the charges and evidence pertained specifically to medical competency. Their only question was one of the sufficiency of the evidence in a quantitative sense.

The facts of this case do not present any *special* or *exceptional* circumstances to bring it within the narrow limits of the scope of review of the United States Supreme Court. The reasons for termination of Petitioner's staff privileges have a completely rational connection with his fitness to practice medicine in conformance with the due process clause of the Fourteenth Amendment.

2. Petitioner also alleges a conflict of the Nevada Supreme Court decision with *Thompson v. Louisville,*

362 U.S. 199 (1960). The issue in that case was whether the record was totally devoid of evidence to support the charges. The decision of the Court turned not on the sufficiency of the evidence, but whether the conviction rested on any evidence at all. Both charges in the instant case which were ultimately used as the basis for the termination of Petitioner's staff privileges were supported by substantial and essentially unrebutted evidence of expert and eyewitnesses. If there is any issue on the evidence at all, it is a question of sufficiency only. As a result, the Nevada Supreme Court decision is not in conflict with *Thompson v. Louisville,* supra.

Petitioner, as well as the dissenting Judges in the Nevada Supreme Court decision, assume that the only method of proving medical incompetency is to have actual harm result to a patient from a doctor's conduct. The logical conclusion from this position being that only an injury is acceptable proof that a doctor's conduct is improper. Respondents submit that this reasoning is not the law nor the dictate of logic. All that is required is that there be produced relevant evidence of a substantial deviation from established and accepted practice.

Contrary to Petitioner's statement that a standard for revocation of medical staff privileges was established after the fact, the standard for administering spinal anesthetics and for physical and mental conditions for performing surgery had been in existence prior to Petitioner's actions. These standards were merely defined and presented to the Board of Trus-

tees at the time of the hearing as already established standards. These were not standards arbitrarily created at the time of the hearing. Although these procedures and conditions were not set forth in writing, they were obviously well recognized and long accepted within the medical profession.

C. THE ISSUES RAISED HERE HAVE BEEN PREVIOUSLY DECIDED OR INVOLVE A QUESTION OF REVIEWING EVIDENCE WHICH DOES NOT CONSTITUTE A SIGNIFICANT AND COMPELLING CONSTITUTIONAL QUESTION.

1. The validity of the standard of unprofessional conduct has been considered and accepted by this Court in prior decisions as a valid standard for assessing the conduct of a professional person. *Selling,* supra; *Schware,* supra; *Konigsberg,* supra.

The lower state and federal courts are virtually unanimous in accepting the proposition that all prohibited conduct that might be a basis for termination of medical staff privileges need not be in writing or specifically defined. *Selling v. Radford,* supra; *Konigsberg v. State Bar,* supra; *Sosa v. Bd. of Management of the Val Verde Memorial Hosp.,* supra; *Woodbury v. McKinnon,* supra; *North Broward Hospital Dist. v. Mizell,* supra; *Arizona State Bd. of Medical Examiners v. Clark,* supra; *Darling v. Charleston Community Memorial Hospital,* supra; *Schware v. Bd. of Bar Examiners,* supra; *Thompson v. Louisville,* supra, and Southwick, Hospital Medical Staff Privileges, 18 *DePaul Law Review,* 655 at page 663.

If any conflicts exist in the lower court decisions, it is only in the area of different facts in each case and not as to the applicability of the general principles. Petitioner is in essence requesting this Court to review the evidence and make a finding that even though there was some there was not enough evidence of "unprofessional conduct" to justify the severe action of termination of medical staff privileges. The hearing officer treated this question in his proposed decision and recommendation by stating that he felt that the evidence and the nature of two of the charges compelled and supported termination of Petitioner's staff privileges in order to insure the "highest type of medical service" to the community. (Petitioner's Appendix C, pp. xxvii and xxix) Subsequently, two appellate hearings on this issue were held, one in the First Judicial District Court and one in the Nevada Supreme Court, and both courts have held that there was sufficient evidence to justify the Board's action. Petitioner is now requesting this Court to review the judgment of the Board and two state courts.

D. NO QUESTION OF IMPERATIVE PUBLIC IMPORTANCE EXISTS WHICH WOULD JUSTIFY A WRIT OF CERTIORARI BEFORE JUDGMENT OF THE NINTH CIRCUIT COURT IN VIOLATION OF UNITED STATES SUPREME COURT RULE 20.

1. The exact issues presented to this Court in the Petition for Writ of Certiorari are presently pending in the Ninth Circuit Court of Appeals as a result of Petitioner's appeal from the United States District Court's order dismissing Petitioner's action. (Appendix D, p. xv)

The identical claim under the identical record that was presented to the Supreme Court of Nevada was presented to the United States District Court, for the District of Nevada. (Appendix C, *infra*, pp. xii-xiv) This case does not raise any questions of imperative public importance to justify the granting at this time of a Writ of Certiorari in violation of United States Supreme Court Rule 20, which states:

> "A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

CONCLUSION

The Writ of Certiorari requested by Petitioner should be denied for the reason that there is no substantial federal question involved; there exists no conflict between the Nevada Supreme Court decision

and prior United States Supreme Court decisions in this similar area; and there is no real conflict in the existence of the general principles involved in this type of case.

Dated, Carson City, Nevada,
August 23, 1972.

Respectfully submitted,
PAUL LAXALT,
Counsel for Respondents.

(Appendices Follow)

Appendix A

A special staff meeting was called by the Chief of Staff of the Carson Tahoe Hospital was brought to order at 7:38 P. M. July 30, 1969. The purpose was to consider the actions of the Executive Committee regarding Dr. Moore and his activities over the last week end. In attendance were Doctors Hines, Brown, King, Grundy, Stewart, Petty, Harper, Veverka, Ross, Baggett, Fulper, Moore, Collier, and Schieve. In addition there was also in attendance Mr. McGlade, George Allison, and Mr. Carl Martillaro. The meeting started with the issuance of copies of four letters that had been read at the Special Executive Committee meeting. The first letter was from Mrs. Blakely, and R. N. on duty at the hospital. The second letter was from Dot Hamen, anesthetist at the Carson Tahoe Hospital. The third letter was from Miss Indermuhl, R. N. chief nurse of obstetrics. The fourth letter was from Mrs. Bryant, R. N. of the Carson Tahoe Hospital. It was requested by Dr. Hines that all copies except for Mr. Allison and one for Mr. Martillaro be returned at the end of the meeting. Dr. Hines then proceeded to give further background on the events that had happened the following week end concerning Dr. Moore. First, Dr. Moore's behavior in his car downtown during the weekend. It was reported that Dr. Moore in attempting to pull into a parking lot in front of the post office backed on to the curb, striking a parking meter. He then backed rapidly away at about 10 miles an hour and striking a car that was parked behind. In this car were people

who know Dr. Moore and expected him to come out and make some statement to them. Dr. Moore then proceeded into the post office. On coming out of the post office he drove away in such a manner as to upset and concern both pedestrians on the street and observers on the sidewalk. This was at approximately 2:30 the afternoon of Sunday, July 27, 1969. Secondly, the following evening George Moore was called by the Chief of Staff at approximately 7:00 P. M. to request him to discuss with him the impending surgery scheduled for Monday July 28th. Dr. Moore was asked to come over, however, Dr. Moore was unable to attend this meeting due to a conflicting engagement. However, agreement was made to meet at the hospital at approximately 7:30 A. M. the morning of Monday July 28, 1969. The Chief of Staff stated that the prime reason for this desired meeting was the voice of concern that had been raised by nursing members of the hospital concerning Dr. Moore's ability at that time, and that the Chief of Staff wanted to get Dr. Moore's version of the events that had happened on the preceding day. The Chief of Staff then stated "The next morning I was in the medical library and saw Dr. Moore drive into the driveway of the Carson Tahoe Hospital. In so doing he drove two wheels over the curb and then had difficulty in parking his car. This led me to believe that he was not coordinating well at that time. Then Dr. King came into the library and at my request went down to help evaluate Dr. Moore's ability to do the surgery scheduled at 8:00. After talking with Dr. Moore I advised him that the proposed scheduled surgery was cancelled".

Following this a special Executive Committee meeting was called at noon of Monday, July 28th, to evaluate the actions of Dr. Moore.

The minutes of the Special Executive Committee meeting of July 28, 1969 were read. Comments were then invited from Dr. Hines. Dr. Moore then stated in rebuttal that they be examined with the first baby in the nursery. He also stated that the window mentioned in Miss Indermuhl's letter was defective and that a spring came out and required replacement before proper examination of the baby could be done. He also stated that he had difficulty in hearing the baby at that time and had difficulty in evaluating the descent of the testicle. Second: In regarding Mrs. Bryant's letter he stated that the laughing and kidding mentioned in her letter is a usual and customary thing with him with that particular nurse. Thirdly: In regarding the automobile accident, Dr. Moore stated that he is officially charged with reckless driving and that this citation is accepted by him. He pointed out the officer did follow him to the hospital and that there was no request by the officer for a blood alcohol or that there was any question of his sobriety.

Following this there was an open discussion. Dr. Petty asked Dr. Hines on what basis did Dr. Hines feel that Dr. Moore was not capable of performing the surgery. Dr. Hines in answer stated that I watched him drive in, and also on entering the emergency room he walked with a lack of coordination and he talked with difficulty. Dr. Petty then asked Dr.

King if he corroborated the above report and Dr. King answered yes. Next, Dr. Grundy stated that he wished to know a little bit more about the alleged spinal tap. Dr. Hines then stated that as Chief of Staff and with the permission of the patient, looked at the back of the patient. There appeared to Dr. Hines to be a number of skin puncture wounds that ranged from T11-T12 to L4-5. Dr. Grundy then asked how many, Dr. Hines stated approximately 8. Dr. Moore then spoke up and said I kept the needle point sterile at all times and there were more like three puncture sites. Dr. Petty then asked, George, can you explain the accusation that you have been atoxic and disoriented. Dr. Moore stated that this should be obvious that I have a right foot drop and that I have a partial paralysis in my right leg and at times I have fallen while attempting to walk. Dr. Grundy then asked Dr. Moore did you have any more difficulty walking Tuesday (sick) than you do now. Dr. Moore: No. Dr. Grundy: Did you have any more difficulty talking Tuesday (sick) than you do now. No. Dr. Grundy then directed the questioning to Dr. Hines and Dr. King: Do you agree? Dr. King responded, yes, he definitely had more difficulty in talking then and walking then than he does now. The discussion then evolved about the habitual use of gloves. Dr. Moore stated that he had been trained to do spinal punctures without the use of gloves and also that he did circumcision without the use of gloves. Dr. Grundy asked when he took his residency training. Dr. Moore responded 1949-1952. Dr. Hines then

asked: When did you first use gloves in the past? Dr. Moore responded that the first spinal tap given at this hospital was without gloves and for this he was criticized by the nursing staff. Dr. Brown then stated that during the time that he took training in Houston that at every hospital that he had been in required the use of sterile technique and the use of sterile gloves.

Dr. Grundy asked: When did you first start using gloves? Dr. Moore stated I first started using them here. Dr. Grundy asked: Have you always used them since? Dr. Moore responded some times yes and sometimes no. Dr. Grundy stated that I might say that at four major hospitals that I trained at in Houston gloves and sterile technique were enforced and have been done so since then because I called to a friend of mine who reported their use. Dr. Hines asked: Is there anyone here who has trained in spinal taps without the use of sterile gloves? There was no answer from the floor. Dr. Petty: During the last one and one-half years Dr. Grundy and I have been together at many social gatherings. During that time Dr. Moore has been noted to cut off his drinking at 3-4 drinks at a social gathering and has conducted himself in a gentlemanly manner. As far as a dilemma is concerned on the other side I have colleagues who question Dr. Moore's use of drugs or is under a mental aberration. Dr. Moore: I have found recently that I have a hypoglycemic condition. I also know that I do have a personality problem. In my Army 201 file I have records both good and bad occurring

simultaneously. Dr. Moore then presented a lab slip dated 6-24-69 showing a blood sugar series.

Dr. Moore then continued to state that he does have an uncontrollable temper, however, that he normally will apologize to the nurses at the hospital. Dr. Hines then stated that he would like to bring up some other facts that we are to consider in this case. The first is, previous incidents that have brought Dr. Moore's attention before the Medical Staff and also Dr. Hines wished to point out that the final power rested with the Board of Trustees as to whether he should be removed or not. Two copies of past meetings were passed around. The first was that of an Executive committee meeting that occurred April 6, 1966. Dr. Hines then added that he felt that a man's record is most important in considering an action, such as the nature of this. In referring to the April 6, 1966 meeting Dr. Hines pointed to a paragraph that stated "Dr. Moore stated it would be definitely understood that if his actions again became such that the Medical Staff Action had to be taken, it would mean automatic resignation or suspension". The second meeting passed around was an extract from the Special Executive Committee meeting of February 14, 1969. That was passed by the Staff February 17, 1969. Dr. Hines specifically called attention to paragraph number five that stated: "It is strongly recommended that any further misconduct on the part of Dr. Moore which is deemed to constitute unprofessional conduct by a majority of the Medical Staff so calls for the automatic, immediate, and permanent removal from the Medical

Staff and a recommendation to the Board of Trustees that the privileges of Dr. Moore be totally and permanently revoked". Dr. Hines then asked if there was any further discussion. Dr. Grundy then stated that he felt that the incident that occurred regarding the automobile action occurred a reasonable time both before and after anytime that Dr. Moore had occasion to be at the hospital, and that it should not be taken into consideration at this meeting. Dr. Hines stated I disagree with you, when such a grave decision is involved. Dr. Hines then asked Dr. Moore when did you come up to the hospital? Dr. Moore responded I came up to the hospital to do the circumcision. Dr. Grundy then stated I am sorry I retract the preceding. Dr. Harper then stated: When the glucose tolerance test was taken was this in relation to any incident. Dr. Moore: No. Dr. Fulper then requested the floor and stated "While only a probationary member of the hospital, I am allowed to have patients in the hospital. I would like to render an opinion. Putting it bluntly I feel Dr. Moore is ill and when such a time as he has recovered he should be reconsidered for practice on this hospital. I cannot see how we can allow a man to endanger the health of patients in this hospital. Mr. Martillaro then stated that from a legal standpoint all past statements have been subjective.

Following this there was a period of open discussion by several members simultaneously including Dr. Fulper, Dr. Brown and others. Dr. Ross then pointed out in answer to Mr. Martillaro it must be recognized that each individual point is not a separate entity but must

be considered in the whole picture. Dr. Harper then stated: I feel this is more than a subjective observation when two colleagues stop a fellow man from doing surgery. Mr. Martillaro then asked when Dr. Moore arrived was he articulant? Was there odor of alcohol? Was there any obvious use of drugs? And other questions of this nature. Dr. Harper then stated: Do you want to crawl up on a table if you have to be *questioned,* if the M. D. is surgically competent. Mr. Martillaro answered of course not. Dr. Hines then stated: Carl, this is a medical staff meeting not a court of law, it is a physician's meeting and you may have your opportunity in a court of law. Mr. Martillaro then asked is the Carson Tahoe Hospital now a public hospital? Mr. Allison answered yes. Dr. Hines then asked Dr. Moore, do you feel that you were competent to do the surgery Tuesday morning. Dr. Moore answered yes. Dr. King stated that there was some question in his mind and that he had people standing by in case of necessity.

It was pointed out that since the surgery was not done, not because of the incompetence of any physician, but because the patient had eaten. It was pointed out that it was the decision of the Chief of Staff that Dr. Moore was not able to do surgery at the originally scheduled 8:00 time. Dr. Stewart then requested the floor. He stated: I feel this is a meeting of physicians and not of lawyers. I feel that a man must speak up on his principles and a man who does not speak up is a coward. It is a fact that George has come before the Executive Committee

time and time again. I do not feel that George is well. I feel that George can be helped. Also there is on the last minutes that George has paroxysmal tacchycardia. I am speaking medically. I feel something is wrong with George. Or something is wrong with us. George has stated to us that he is not a well man. I am asking you as physicians, is he a well man? This has happened repeatedly over the last five years. We feel that only a physician can police another physician. I do feel that due to the fact that George Moore had repeatedly become before this group within the last few years that something must be done about Dr. Moore. I want to help George. Dr. Hines then requested follow-up action on the motion of the Executive Committee. Dr. Grundy then requested that Dr. Moore have no vote and a roll call vote be made. Dr. Hines stated that before he would rule this he would ask the two attorneys if Dr. Moore had a right to vote. Mr. Allison stated that as he is at the present time a full and active member of the staff he should have a vote. Mr. Martillaro agreed. Dr. Moore then stated that before I vote I will categorically state that I will undergo any physical or mental examination by any facility properly trained to so do. The next question then arose whether or not this was an open meeting. It was then pointed out that permission had specifically been granted by the Chief of Staff for the attendance of Mr. Allison and Mr. Martillaro. After considerable discussion concerning parliamentary procedure it was then moved by Dr. Harper that the Medical Staff recommend to

the Board of Trustees that George Moore be removed from the Medical Staff. This was seconded by Dr. Grundy. In an ensuing discussion Mr. Allison pointed out that the recommendation should include the grounds. Therefore, Dr. Harper amended the above motion to read that, the Medical Staff recommended to the Board of Trustees that Dr. Moore be removed from the Medical Staff on the grounds of unprofessional conduct. This was seconded by Dr. Grundy. Dr. Stewart then stated that before the vote was taken he would personally recommend that Dr. Moore be suspended until such a time that he is fully able to practice medicine. This position was endorsed by Dr. Ross and Dr. Collier. Following this a roll call vote was taken. The vote was taken by name and in order of seating was: Dr. Brown: For, Dr. King: For, Dr. Schieve, For, Dr. Grundy: For, Dr. Sewart: Against, Dr. Petty: For, Dr. Harper: For, Dr. Grundy: For, Dr. Ross: Against, Dr. Moore: Against, Dr. Collier: Against. The motion therefore stood at 7 for and 4 against. The Chief of Staff did not vote. The Chief of Staff announced that the motion had passed and the meeting was therefore adjourned.

Appendix B

(Letterhead of
Carson-Tahoe Hospital
County of Ormsby
1201 North Mountain Street
Carson City, Nevada 89701
Phone Area Code 702 882-1361)

July 31, 1969

To: Carson Tahoe Hospital Board of Trustees
From: T. K. Hines, M.D., Chief of Staff

The Medical Staff of the Carson Tahoe Hospital recommends to the Board of Trustees of the Carson Tahoe Hospital that the staff privileges of George L. Moore, M.D. be immediately terminated, due to unprofessional conduct.

Sincerely,
/s/ T. K. Hines, M. D.
Chief of Staff

Appendix C

In the United States District Court
for the District of Nevada

Civil No. R-2670

George L. Moore,
Plaintiff,

vs.

William E. Schultz, William A. Young, L. Gene Gold, Joseph N. Littlefield, Mary O. Knapp and William R. King, individually and as the Board of Trustees of Carson-Tahoe Hospital, and Does 1 through 25,
Defendants.

[June 28, 1972]

ORDER DISMISSING ACTION

This is an action under the Civil Rights Act, 42 U.S.C. §1983, seeking a decree abrogating a decision of the Board of Trustees of Carson-Tahoe Hospital which had terminated plaintiff's privilege to use the hospital as a member of the hospital staff. Plaintiff contends that the law and regulations providing for discipline for "unprofessional conduct" are unconstitutionally vague and indefinite and do not comport with due process standards.

The identical claim under the identical record was presented to the Supreme Court of Nevada, *Moore v. Board of Trustees, et al,* 88 Nev. ....., 495 P.2d 605, and was decided adversely to plaintiff.

The final judgment of the Nevada Supreme Court is res judicata and this Court has no jurisdiction to reconsider and redetermine issues of fact and law which have been finally adjudicated by a state court of competent jurisdiction.

In *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923), the Court said:

> "It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject matter and the parties; that a full hearing was had therein; that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the State on an appeal by the plaintiffs. 191 Ind. 141. If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. Elliott v. Peirsol, 1 Pet. 328, 340; Thompson v. Tolmie, 2 Pet. 157, 169; Voorhees v. Bank of United States, 10 Pet. 449, Cornett v. Williams, 20 Wall. 226, 249; Ex parte Harding, 120 U.S. 782."

In *England v. Medical Examiners,* 375 U.S. 411 (1964), the Court said:

> "We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forgo his right to return to the District Court."

The *England* case involved federal abstention to permit prior consideration by the state court of a controlling question of state law. There the action had initially been properly commenced in the federal court. If the doctrine of res judicata applies in that circumstance, *a fortiori* it must apply where the issues of fact and law were first presented and prosecuted to final judgment in the state court system. See, also: *Brown v. Chastain,* 416 F.2d 1012 (5th Cir. 1969); *Rankin v. Florida,* 418 F.2d 482 (5th Cir. 1969).

It Hereby Is Ordered:

1. The restraining order heretofore issued is hereby dissolved.

2. The action entitled above is hereby dismissed.

Dated: June 28, 1972.

/s/ Bruce R. Thompson
United States District Judge.

Appendix D

In the United States District Court
for the District of Nevada

Civil No. R-2670

George L. Moore,
Plaintiff,

vs.

William E. Schultz, William A. Young, L. Gene Gold, Joseph N. Littlefield, Mary O. Knapp and William R. King, individually and as the Board of Trustees of Carson-Tahoe Hospital, and Does 1 through 25,
Defendants.

[July 11, 1972]

NOTICE OF APPEAL

Notice is hereby given that George L. Moore, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on the 28th day of June, 1972.

Dated this 11th day of July, 1972.

/s/ Carl F. Martillaro
Carl F. Martillaro,
Attorney for Plaintiff
308 North Curry Street
Carson City, Nevada 89701

Appendix E

No.

United States Court of Appeals
For the Ninth Circuit

George L. Moore, Plaintiff-Appellant, vs. William E. Schultz, William A. Young, L. Gene Gold, Joseph N. Littlefield, Mary O. Knapp, and William R. King, individually, and as the Board of Trustees of Carson-Tahoe Hospital, Defendants-Appellees.	Civil No. R-2670

RECORD ON APPEAL

From the _____ District of Nevada

Record in _____ Volumes

Clerk's Record (Pleadings) in I Volumes (Volume I of Record) Reporter's Transcript in O Volumes

Hon. Bruce R. Thompson, Trial Judge

Names and Addresses of Attorneys of Record

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For Appellee:
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Attorneys at Law
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Carson City, Nv 89701

Transmitted to the U. S. Court of Appeals
For the Ninth Circuit on August 9, 1972
Volume I